

**DECISION**



*J. A. Carter*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

7847

FILE: B-191037

DATE: September 27, 1978

MATTER OF: Memorex Corporation

**DIGEST:**

1. Protest against sole-source procurements is timely ~~since~~ doubt as to date on which protester knew or should have known protest basis is resolved in favor of protester in absence of objective evidence to contrary.
2. Rule that contracts executed and supported by fiscal year appropriations may only be made within period of obligation availability and must concern bona fide need arising within the period of that availability is not applicable to procurement by GPO from revolving fund specifically exempted from fiscal year limitation.
3. Protester was not prejudiced by agency's failure to contact protester directly during conduct of market survey since protester's equipment did not meet agency's mandatory requirements.
4. Requirement for prior delivery of disc system is not unreasonable method of ascertaining reliability where time for procurement is short and information provided is used to contact current users of system and establish viability based on their comments.

5. Failure in market survey to provide details of requirements to potential vendor is not unreasonable in view of time constraints, primary reliance on technical literature and agency contacts, and contacts with General Services Administration which should have been able to provide expert advice on both marketplace and equipment.
6. Protest against sole-source awards is denied where agency performed adequate market survey and record establishes that awardees were only known firms with equipment capable of meeting agency's requirements.

By letter of January 5, 1978, Memorex Corporation protests the award by the Government Printing Office (GPO) of two contracts negotiated on a sole-source basis. Memorex protests the award to Storage Technology Corporation (STC) of a purchase order for a 2-year lease of disc drives and related equipment and the award to CONTEN for rental of a communications control unit for a period of at least 11 months.

GPO challenges this protest as untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1978), which require that protests be filed with either GAO or the awarding agency within 10 days after the basis for protest is known or should have been known, whichever is earlier. GPO contends that Memorex was informed by telephone on October 20, 1977, of the award to STC, and informed by letter dated November 15, 1977, that its then-installed control unit had been replaced by a CONTEN unit, yet did not file a protest with that agency until January 4, 1978. GPO further contends that Memorex did not request documents relating to the procurements until December 15, 1977, subsequent to inquiring how to obtain such documentation at a meeting held on December 1.

Memorex alleges that it did not learn of either award until around November 17, and that all earlier telephone conversations with GPO were simply discussions of whether GPO had a requirement for equipment. Memorex claims that its representatives met with representatives of GPO within 1 week of the November 17 notice and questioned the awards. Memorex further alleges that at this meeting it requested GPO to provide it with copies of the contracts and sole-source determinations, which GPO promised to provide but did not provide until December 16, following a written request filed by Memorex under the Freedom of Information Act. Memorex contends that it had no basis for protest until it received these documents and became aware of the alleged improprieties they reveal. Memorex then lodged an oral protest with GPO less than 1 week after receipt of the requested documents on December 16.

As stated in Ampex Corporation, B-190629, March 16, 1978, 78-1 CPD 212, " \* \* \* We have held that any doubt as to the date on which knowledge was or should have been obtained as to a protest basis should be resolved in favor of the protester, absent objective evidence refuting its assertions." While there has been considerable dispute between Memorex and GPO concerning this issue, we believe the Memorex protest is timely. Memorex has protested the sole-source awards on the basis that it believes Memorex is capable of fulfilling the requirements set forth by GPO in its Determinations and Findings. The protester could not have known the contents of these documents, and consequently the bases of its protest, prior to receiving them on December 16. Since Memorex protested to GPO within 10 days of this date and protested to GAC within 10 days of GPO's denial of its protest, we consider the protest timely filed. See 4 C.F.R. § 20.2(a), supra.

The GPO advises that these two procurements were the result of an effort to satisfy GPO's growing electronic data processing (EDP) needs through the acquisition of expanded disc storage capacity and an enhanced telecommunications capability. The GPO determined to procure a communications control unit (CCU) to support both of supporting its then-current system configuration, serviced by a Memorex 145, and of meeting its projected telecommunications needs for the next 5 years. Mandatory requirements for the CCU were established on the basis of fulfilling both of these needs. Mandatory requirements for the additional disc storage were established on the basis of current needs. We will concern ourselves here only with those requirements to which Memorex has taken objection or which otherwise are necessary for our decision.

Furthermore, it is incumbent upon us in examining this matter to weigh the competitive effects of GPO's actions in its conduct of these procurements. Competition is the required norm for Federal procurements and we require that interested firms be provided a fair opportunity to participate where circumstances permit. We consider the failure to provide such an opportunity to be an improper prequalification. General Electrodynamics Corporation--Reconsideration, B-190020, August 16, 1978, 78-2 CPD 121. Consequently, in our review we must also consider whether in the circumstances present here the GPO reasonably endeavored to promote competition and to afford interested vendors an opportunity to participate.

We will first consider certain aspects peculiar to the CCU procurement.

In evaluating its projected telecommunications needs, the GPO established a mandatory requirement for the CCU to support both the IBM-SDLC protocol, to which GPO anticipates conversion within 5 years, and partitioned emulation processing (PEP) to support the current system while allowing simultaneous testing of new software. (PEP basically allows a new or replacement processor or device to operate on software and controls tailored to another machine

as that machine would have done while also operating on new or converted software tailored to the new machine.) In addition, GPO required a turnkey system (deliverable within 60 days to accommodate a software development contract then underway and to utilize idle installed equipment awaiting completion of that contract. The CCU was also required to possess compatibility and a backup capability with the COMTEN CCU's installed in other legislative branch EDP systems.

After identifying its needs, the GPO states that it surveyed the market for CCU's through a "review of technical periodicals published within the last year, review of technical literature of vendors, conversations with communication equipment vendors currently on GSA schedule and two vendors not on the schedule." Four systems, including the Memorex 1380, were identified as meeting GPO's requirements for support of the current system configuration; of these, COMTEN's 3670-II was identified as the only CCU capable of also meeting all of GPO's projected needs. It was GPO's assessment that the Memorex 1380 system under consideration would not support PEF, did not meet GPO's requirements for IBM-SDLC protocol handling, and that Memorex could not presently provide a turnkey system. In addition, GPO determined that Memorex's 1380 could not presently provide the backup support and redundancy required of GPO with other legislative agencies utilizing the COMTEN CCU.

Memorex objects to the fact that it was never contacted during GPO's survey of CCU vendors and contends that GPO's use of projected needs in the establishment of its mandatory requirements for a CCU renders the sole-source procurement from COMTEN fatally defective and illegal. In support of this latter contention, Memorex cites a prior decision of this Office, 37 Comp. Gen. 155 (1957), for the proposition that absent special statutory authority, an agency may not make a contract for continuing needs beyond the bona fide needs of the current fiscal year.

We note first that Memorex has misinterpreted our decision. A correct summary of our holding in 37 Comp. Gen. 155, supra, would be that an agency cannot by contract utilize funds authorized for expenditure in one fiscal year to pay for needs occurring in other fiscal years, or, as we stated: "Contracts executed and supported under authority of fiscal year appropriations \* \* \* can only be made within the period of their obligation, availability and must concern a bona fide need arising within such fiscal availability." Burroughs Corporation, 56 Comp. Gen. 142, 153 (1976), 76-2 CPD 472, p. 17; see also Honeywell Information Systems, 56 Comp. Gen. 167 (1976), 76-2 CPD 475; 44 Comp. Gen. 399 (1965). The applicability of these decisions depends on the nature of the funds supporting the contracts in question.

We note in this connection that GPO conducted this procurement utilizing funds in the Government Printing Office Revolving Fund authorized under the provisions of 44 U.S.C. § 309 (1970), which provide in part that the fund is available without fiscal year limitation for specified purposes. Title X of the Legislative Branch Appropriation Act, 1977, Public Law 94-440, 50 Stat. 1459, authorized the GPO to purchase, lease, maintain and otherwise acquire automatic data processing equipment from these funds. We therefore believe that the GPO could accomplish these particular procurements without regard to fiscal year limitations and that the decision cited by Memorex is inapplicable.

Secondly, we fail to see that Memorex was damaged by GPO's failure to contact Memorex directly regarding the CCU procurement. We previously have upheld sole-source awards based on market surveys where the purpose of the survey was not to determine the existence of a company capable of developing equipment responsive to an agency's minimum needs, but to determine whether such equipment is already in existence and, if so, which companies can supply it. See Maremont Corp., 55 Comp. Gen. 1362 (1976), 76-2 CPD 181; Control Data Corp., B-184927, April 23, 1976, 76-1 CPD 276.

We think it clear that this was GPO's purpose here, particularly in view of GPO's stated objective to replace its then-current CCU as soon as possible. In this connection, we note that Memorex has conceded that it could not meet all of GPO's mandatory requirements without additional software development, and we fail to see the advantage to Memorex to be gained by communicating this directly to GPO.

The procurement of additional disc drives and the related control unit was undertaken to add 2.5 billion bytes of storage to GPO's system to support applications being added during the 1978 fiscal year. GPO's mandatory requirements for the disc system included a requirement for a system which had been delivered previously and which could be delivered within 90 days from receipt of purchase order or to coincide with the installation of GPO's new on-line systems. GPO's requirement for prior delivery was premised on a need for proven reliability. GPO surveyed the market through investigation of "the DATAPRO Reports on computer equipment, numerous ADP technical periodicals, and personal contacts at other agencies, including GSA." Four vendors, including Memorex, were identified as having satisfactory equipment, but only STC was identified as capable of meeting the delivery schedule and the requirement for prior delivery. In this regard, GPO noted that Memorex had never delivered a disc system with its own model 3674 controller and that although the Memorex disc drives were deliverable with an IBM control unit, IBM was quoting a 1-year delivery time. The GPO concluded, therefore, that Memorex would be unable to meet its delivery requirements.

Memorex disputes the propriety of the prior delivery requirement, contending that it bears no rational relationship to reliability or any other quality. The GPO requirements underlying the D&F associated with this procurement stress reliability as the justification for requiring an "off-the-shelf" system.

While we agree with Memorex that a bare requirement for prior delivery is not the best means for determining that a system's reliability has been

established, we do not think that this reading reflects the actual intent and use of the requirement by GPO. The STC sole-source justification states that current users were contacted and that the disc system's viability was established through these contacts rather than being implied from the mere fact of prior delivery. We would find it difficult to suggest a better method of ascertaining a system's operational reliability than by inquiry to users and, given GPO's time constraints for this procurement, we cannot regard this to be an unreasonable method of identifying users.

Memorex also contends that the market survey performed by GPO on this procurement was both deficient and conducted in such a manner as to be misleading. Regarding this latter point, Memorex states that in response to its inquiries, the GPO denied that it was contemplating an imminent purchase of the disc drives and controller and that Memorex therefore provided only general information on its disc system rather than responding to a specific requirement with detailed information. Memorex argues that had it been advised of GPO's actual requirements, it could have demonstrated both its compliance with the prior delivery requirement and its ability to deliver a disc system within the required time constraints by combining the Memorex disc drives with an IBM 3830-2 control unit available through an independent leasing company. Memorex has demonstrated to our satisfaction that its disc drive has been delivered in this configuration and that an IBM controller could have been obtained within the time specified. We note also that Memorex advised the GPO that the Memorex disc drive and the IBM controller were compatible in its written response to GPO's inquiry. However, as we noted above, the GPO had been quoted a 1-year delivery time by IBM.

Memorex contends that the only valid way to "survey" a market is to issue a solicitation and in support of this proposition cites our decision in 52 Comp. Gen. 987 (1973), in which we rejected sole-source awards based on market surveys where we found

"a proclivity to sole-source awards under selection methods wherein 'unique' capabilities are pointed to in justification for departures from the regulatory requirements for competitive negotiation." 52 Comp. Gen. 987, supra, at 992. We concluded in that case that the contracting agency had not endeavored to demonstrate that the awardee possessed unique capabilities to the exclusion of all other interested firms, and we determined that there were in fact other interested companies that could have bid for the contract.

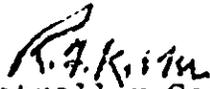
We think that the decision cited by Memorex is distinguishable from the present case. We note at the outset that the subject matter of our decision in 52 Comp. Gen. 987, supra, was a contract for the performance of a long-term study involving for the purposes of competitive evaluation what was essentially a subjective assessment of an offeror's future ability to perform, whereas the procurement here involves an assessment of present technical capability more susceptible to objective evaluation. We note also that in the cited case the procuring agency prequalified the awardee without making an effort to identify possible competitors, while in the present matter the GPO undertook to survey the market and to identify the equipment able to meet its needs.

While a close question, we do not believe that the market surveys undertaken by the GPO in connection with these procurements were unreasonably restrictive of competition. Although we are troubled by GPO's apparent reluctance to furnish more details of its requirements to Memorex, we previously have considered as sufficient a market survey based on a literature search and agency contacts not unlike that conducted here. See Del Norte Technology, Inc., B-183528, August 5, 1975, 75-2 CPD 82. GPO's survey not only included an extensive review of the literature, but, with regard to the disc system, also involved contacts with vendors and with the General Services Administration, the agency granted the authority under the Brooks Act, 40 U.S.C. § 759 (1970), to coordinate and provide

for the efficient purchase, lease and maintenance of ADP equipment by Federal agencies and which Memorex concedes should be familiar with its equipment and the marketplace. We think it significant that GPO contacted the GSA even though GPO was exempted under Public Law 94-440, supra, from the requirements of the Brooks Act, supra, for these procurements and must weigh this effort to obtain information against what appear to have been less than comprehensive inquiries to vendors. On balance, we are not prepared to state that GPO's failure to furnish all of the details of its requirements to Memorex was unreasonable in view of the time constraints involved, GPO's primary reliance on technical literature and agency contacts, and its contacts with the GSA which should have been able to provide expert advice regarding both equipment and the marketplace. We think the GPO was entitled to rely on the results of this survey.

As a general rule, we will not disturb a decision to procure on a sole-source basis where the Determination and Finding to negotiate on a sole-source basis is supported by a record sufficiently establishing that the awardee was the only known source with the capability to satisfy the procuring activity's requirements. See Hayden Electric Motors, Inc., B-186769, August 10, 1977, 77-2 CPD 106; Triple A Machine Shop, Inc., B-185644, March 25, 1976, 76-1 CPD 197; B-175553, July 21, 1972. We believe that this is the case here.

The protest is denied.

  
Acting Comptroller General  
of the United States